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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 175

[Docket No. PHMSA-2015-0165]

RIN 2137-AF12

Hazardous Materials: Carriage of Battery-Powered Electronic Smoking Devices in Passenger Baggage

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Interim final rule.

SUMMARY: PHMSA is issuing an interim final rule to prohibit passengers and crewmembers from carrying battery-powered portable electronic smoking devices (e.g., e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, electronic nicotine delivery systems) in checked baggage and prohibit passengers and crewmembers from charging the devices and/or batteries on board the aircraft. These devices may continue to be carried in carry-on baggage. This action is consistent with a similar action taken by the International Civil Aviation Organization (ICAO) that incorporated this restriction into the 2015-2016 Edition of the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air by way of an addendum and is necessary to address an immediate safety risk. This interim final rule does not impact the existing rules on the transport of lithium batteries or other portable electronic devices that are transported for personal use in a passenger's checked or carry-on baggage.

Because the actions taken in this interim final rule address a public safety risk, PHMSA finds that good cause exists to amend the regulations without advance notice and opportunity for public comment. For the reasons described below, public notice is impracticable, unnecessary, and contrary to the public interest. PHMSA encourages persons to participate in this rulemaking by submitting comments containing relevant information, data, or views. We will consider all comments received on or before the closing date for comments. We will consider late filed comments to the extent practicable. This interim final rule may be amended based on comments received.

DATES: Effective Date: The effective date of these amendments is [INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments: Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods:

1. Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
2. Fax: 1-202-493-2251.
3. Mail: Docket Management System; U.S. Department of Transportation, Dockets Operations, M-30, Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, DC 20590-0001.
4. Hand Delivery: To U.S. Department of Transportation, Dockets Operations, M-30, Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., Washington,

DC 20590-0001 between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: Include the agency name and docket number PHMSA-2015-0165 or RIN 2137-AF12 for this rulemaking at the beginning of your comment. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information provided. If sent by mail, comments must be submitted in duplicate. Persons wishing to receive confirmation of receipt of their comments must include a self-addressed stamped postcard.

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

Docket: You may view the public docket through the Internet at <http://www.regulations.gov> or in person at the Docket Operations office at the above address (See ADDRESSES).

FOR FURTHER INFORMATION CONTACT: Kevin A. Leary, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, telephone (202) 366-8553.

SUPPLEMENTARY INFORMATION:

I. Background

A battery-powered portable electronic smoking device (e-cigarette), also called an e-cig, a personal vaporizer or electronic nicotine delivery system, is a battery-powered device that simulates tobacco smoking. E-cigarettes contain a liquid, an atomizer or heating element, and a battery. When an e-cigarette is operated by a user, the heating element vaporizes the liquid. Many e-cigarettes are designed to look like traditional cigarettes, but they are also made to look like cigars, pipes, and even everyday products such as pens. The use of e-cigarettes has been rising substantially and e-cigarettes have increasingly become a common item in passenger baggage. Airline passengers and crewmembers are currently permitted to carry these devices under the provisions for portable electronic devices contained in 49 CFR 175.10(a)(18). However, the provisions for portable electronic devices do not adequately address the safety risks posed by e-cigarettes, which include a heating element as a function of their design.

Recent fire incidents involving e-cigarettes in checked baggage, along with actions taken by the Federal Aviation Administration (FAA) and ICAO, highlight the need for PHMSA to take prompt action to address this issue.

On August 9, 2014, at Boston's Logan Airport, an e-cigarette contained in a passenger's checked bag in the cargo hold of a passenger aircraft caused a fire that forced an evacuation of the aircraft. An airline ramp agent noticed smoke coming from the bag. The bag was removed from the aircraft cargo compartment and investigators determined the source of the fire was an e-cigarette, which continued to burn after it was removed from the bag. Air carrier personnel extinguished the fire. Massport Fire responded and ensured the fire was no longer burning. The fire burned a hole approximately 4 inches in diameter in the outer pocket of the bag. Passengers were deplaned as a precaution.

On January 4, 2015, at Los Angeles International Airport, a checked bag that arrived late and missed its connecting flight was found to be on fire in a baggage area. Emergency responders attributed the fire to an overheated e-cigarette inside the bag.

These incidents have shown that e-cigarettes can overheat and cause fires when the heating element is accidentally activated or turned on. This danger may be exacerbated by the growing trend of users modifying and rebuilding their reusable e-cigarette devices and swapping components, which may include the use of batteries, heating elements, and electronic components not original to the manufactured e-cigarette.

An October 2014 report from the U.S. Fire Administration¹ identified at least 25 incidents of explosion and fire involving e-cigarettes between 2009 and 2014. Many of these incidents occurred while the device was charging and resulted in the ignition of nearby combustible materials. This report highlights the risks associated with charging e-cigarettes.

Following the fire at Logan Airport, on December 10, 2014, the ICAO issued an Electronic Bulletin (EB) titled, Dangerous Goods Carried by Passenger and Crew – Incidents Related to Electronic Cigarettes (EB 2014/074).² The ICAO bulletin recommended that a passenger's e-cigarettes be carried in the cabin of the aircraft and not in checked baggage.

¹ Electronic Cigarette Fires and Explosions, U.S. Fire Administration, October 2014 (See appendix 1 for a list of the incidents) https://www.usfa.fema.gov/downloads/pdf/publications/electronic_cigarettes.pdf

² Dangerous Goods Carried by Passenger and Crew – Incidents Related to Electronic Cigarettes, Electronic Bulletin (EB) 2104/074, International Civil Aviation Administration (ICAO), October 10, 2014, http://www.faa.gov/about/office_org/headquarters_offices/ash/ash_programs/hazmat/passenger_info/media/ICAO_ecigarettes_bulletin.pdf

On January 22, 2015, the FAA issued a Safety Alert for Operators (SAFO)³ that highlighted current provisions of the hazardous materials regulations (HMR), which state, “transportation of battery-powered devices that are likely to create sparks or generate a dangerous evolution of heat is prohibited unless they are packaged in such a manner to preclude such an occurrence (see 49 CFR 173.21(c)).” The SAFO further recommended that air operators require their passengers to carry e-cigarettes only in the cabin of the aircraft.

Effective June 9, 2015, the ICAO published an addendum to the 2015-2016 ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air to prohibit carriage of e-cigarettes in checked baggage and restrict the charging of these devices while on board the aircraft. This addendum constitutes an amendment to the 2015-2016 ICAO Technical Instructions, which took effect on January 1, 2015. On January 8, 2015, PHMSA published a rulemaking harmonizing the HMR with the 2015-2016 ICAO Technical Instructions. This issuance of this interim final rule is necessary to incorporate the June 9, 2015 amendment to the Technical Instructions to address the known safety risk.

The partial restriction in this interim final rule applies only to battery-powered portable electronic smoking devices (e.g., e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, electronic nicotine delivery systems). Passengers and crewmembers can continue to carry battery-powered portable electronic smoking devices in carry-on baggage. This interim final rule does not

³ Fire Risk of Electronic Cigarettes (e-cigarettes) in Checked Baggage, Safety Alert for Operators – SAFO15003, Federal Aviation Administration (FAA), January 22, 2015, https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2015/SAFO15003.pdf

prohibit a passenger from transporting other devices containing batteries for personal use (such as laptop computers, cell phones, cameras, etc.) in checked or carry-on baggage nor does it restrict a passenger from transporting batteries for personal use in carry-on baggage.

II. Justification for Interim Final Rule

PHMSA is issuing this interim final rule without providing an opportunity for prior public notice and comment as is normally required by the Administrative Procedure Act (APA). See 5 U.S.C. 553. The APA authorizes agencies to dispense with certain notice and comment procedures if the agency finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. See 5 U.S.C. 553(b)(3)(B). “Good cause” exists in impracticable situations when notice unavoidably prevents the due and required execution of agency functions or when an agency finds that due and timely execution of its functions is impeded by the notice otherwise required by the APA. For example, an “impracticable” good cause situation might be where air safety rules should be amended without delay if the FAA determines that the safety of the traveling public is at stake. Public notice is unnecessary when the public does not need or benefit from the notice and comment, such as with a minor or technical amendment. “Public interest” supplements the other terms and requires that public rulemaking procedures must not prevent an agency from operating and that a lack of public concern warrants an agency dispensing with public procedure.

In this case, the agency finds, for good cause, that notice and public comment is impracticable, unnecessary, and contrary to the public interest. The importance of the

safety of the flying public provides good cause for this measure. Here, there is a credible indication of an emerging transportation safety risk from two recent incidents involving battery-powered portable electronic smoking devices in checked baggage and additional non-transportation incidents that occurred while these types of devices were being charged. In August 2014 at Boston's Logan Airport, an e-cigarette contained in a passenger's checked bag caught fire pre-flight and caused the evacuation of an airplane. Similarly, in January 2015 at Los Angeles International Airport, a bag containing an e-cigarette was found to be on fire in a baggage area. The bag in question had missed a flight connection, and should have been in the air at the time of the incident. Although neither airplane was in the air when the fires ignited, these incidents represent two near misses for the safety of aviation passengers. E-cigarettes in checked bags present a safety risk because the devices are capable of generating extreme heat and an incident can result in the ignition of nearby contents. Carriage of e-cigarettes in the passenger cabin addresses this safety risk by ensuring that if an incident does occur, it can be immediately identified and mitigated. PHMSA believes that a delay in implementing this measure could result in serious harm to the traveling public.

Under these circumstances, notice is impracticable and contrary to the public interest. Because ICAO issued the addendum on a very short timeframe due to the gravity of the safety risk, the HMR are currently not harmonized with the ICAO Technical Instructions. Given the safety risks posed by e-cigarettes in checked baggage, PHMSA believes that public notice would frustrate the due and required execution of agency functions. Although some airlines have voluntarily complied with the SAFO recommendations, there is no domestic regulation to require continued compliance with

the recently adopted ICAO amendment. Typically, PHMSA amends the HMR to conform to recent amendments to the ICAO Technical Instructions through periodic international harmonization rulemaking. If PHMSA utilized this process, this HMR amendment would become effective no earlier than January 1, 2017. The accelerated effective date of the addendum to the ICAO Technical Instructions ensures that passengers that travel on international airlines are subject to this provision before PHMSA would have time to issue a final rule through its regular harmonization rulemaking process. In light of the recent incidents and the serious harm that could result from the public safety risk of e-cigarettes in checked baggage, PHMSA believes that a delay caused by adhering to the APA notice-and-comment process to adopt conforming amendments is impracticable and contrary to the public interest.

Further, PHMSA believes that APA notice and comment would be unnecessary because the public would not benefit from such notice. The scope of this regulatory change is very limited; PHMSA is including a new entry for e-cigarettes in 49 C.F.R. 175.10 with carriage instructions. The change does not impact whether passengers may bring their e-cigarettes on an airplane. Instead, the new language affects how the e-cigarettes must be stowed. This rulemaking does not impact the ability to travel by air with these devices. FAA's January 2015 SAFO recommended that air carriers require their passengers to carry e-cigarettes and related devices exclusively in the cabin of the aircraft. In voluntary compliance with the SAFO, many airlines instruct passengers to carry their e-cigarettes in carry-on baggage only. Because a substantial degree of compliance with this safety provision already exists through voluntary airline actions, this amendment is limited in scope yet pivotal for the safety of the traveling public. Thus, in

light of the recent safety incidents and limited scope of the June 9, 2015, ICAO amendment, PHMSA has determined that the notice and comment rulemaking process is unnecessary, impracticable, and contrary to the public interest in this instance.

The DOT is taking immediate action to strengthen safeguards for the carriage of battery-powered portable electronic smoking devices in passenger checked baggage and prohibit passengers and crewmembers from charging the devices and/or batteries on board the aircraft. This interim final rule is effective seven days after publication in the Federal Register. The APA requires agencies to delay the effective date of regulations for 30 days after publication, unless the agency finds good cause to make the regulations effective sooner. See 5 U.S.C. 553(d). This interim final rule meets the good cause exception in this instance because of credible evidence from two separate incidents involving battery-powered portable electronic smoking devices in checked baggage and additional non-transportation incidents that occurred while the devices were being charged. The retroactive nature of the ICAO amendments makes a 30-day effective date impracticable and contrary to the public interest, because such a delay would further extend the time period in which the HMR does not harmonize with ICAO. Because several incidents have highlighted the safety risks of the charging and cargo carriage of these devices, the public interest is served by providing a seven-day effective date for this interim final rule.

The Regulatory Policies and Procedures of DOT (44 FR 110034; February 26, 1979) provide that, to the maximum extent possible, DOT operating administrations should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, PHMSA encourages persons to participate in this rulemaking by

submitting comments containing relevant information, data, or views. We will consider all comments received on or before the closing date for comments. We will consider late filed comments to the extent practicable. This interim final rule may be amended based on comments received.

III. Rulemaking Analysis and Notices

A. Statutory/Legal Authority for this Rulemaking

This interim final rule is published under authority of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 et seq.) and 49 U.S.C. 44701. Section 5103(b) of Federal hazmat law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. 49 U.S.C. 44701 authorizes the Administrator of the Federal Aviation Administration to promote safe flight of civil aircraft in air commerce by prescribing regulations and minimum standards for practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities. This final rule is amending the HMR to maintain alignment with the ICAO Technical Instructions.

B. Executive Orders 13563 and 12866 and DOT Regulatory Policies and Procedures

The Department has determined that the transportation of battery-powered portable electronic smoking devices in checked baggage is an immediate safety threat. Therefore, this rule is being issued to address an emergency situation within the meaning of Section 6(a)(3)(D) of Executive Order 12866. Under section 6(a)(3)(D), in emergency situations, an agency must notify OMB as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of section 6 of EO 12866. The Department has notified and consulted with OMB on this interim final rule. We do not anticipate the actions in this interim final rule will impose a significant impact on airlines, airline passengers, crewmembers, or the Federal government. We expect airlines will incur minimal costs associated with updating notifications to airline passengers (e.g. websites, automated check-in facilities, signage and verbal notifications from the operator). Airlines already have mechanisms to notify airline passengers of hazardous materials restrictions and we expect that airlines would incorporate this additional provision into existing notifications. Airline passengers will still be permitted to carry their e-cigarettes in their carry-on baggage or on their person. Spare lithium batteries must be individually protected so as to prevent short circuits (by placement in original retail packaging or by otherwise insulating terminals, e.g., by taping over exposed terminals or placing each battery in a separate plastic bag or protective pouch). This is consistent with existing requirements for the carriage of spare lithium batteries for portable electronic devices. We do not anticipate this would result in any impact on passengers because these devices are a type of portable electronic device and spare lithium batteries for portable electronic devices are already required to be protected from short circuits and carried in carry-on baggage only. Some passengers may incur a non-

quantifiable cost in the lost opportunity to charge their device while on board the aircraft. We expect that this will be a small number of passengers and that the per-passenger cost will also be small. The Transportation Security Administration may incur new costs associated with amending security procedures for checked baggage to inform security officers that these items should be treated as hazardous materials. PHMSA welcomes public comments on potential costs and benefits of this regulatory action.

Under the Department of Transportation's Regulatory Policies and Procedures (44 FR 11034), this rule is considered to be an emergency regulation. The Department has determined that an immediate safety threat exists in the carriage of battery-powered portable electronic smoking devices in checked baggage and, therefore, this rule is considered to be an emergency regulation. Because of the need to move quickly to address this risk, it would be impractical, unnecessary, and contrary to the public interest to follow the usual procedures under the DOT order.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This rule preempts State, local and Indian tribe requirements but does not impose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous materials transportation law, 49 U.S.C. 5101-27, contains express preemption provisions (49 U.S.C. 5125) that preempt inconsistent State, local, and Indian tribe requirements, including requirements on the following subjects:

- (1) The designation, description, and classification of hazardous materials;
- (2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;
- (4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or
- (5) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This rule addresses subject items (1) and (2) described above and, accordingly, State, local, and Indian tribe requirements on these subjects that do not meet the “substantively the same” standard will be preempted.

Federal hazardous materials transportation law provides at § 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the Federal Register the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of a final rule and not later than two years after the date of issuance. The effective date of Federal preemption is 90 days from publication of this interim final rule in this matter in

the Federal Register. This effective date for preemptive effect should not provide a conflict with the overall effective date for this interim final rule because the FAA Act, and various court decisions dealing with the regulation of air transport, generally preempts State and local requirements. Historically the States and localities are aware of this preemptive effect and do not regulate in conflict with Federal requirements in these situations.

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this interim final rule does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act and Executive Order 13272

Section 603 of the Regulatory Flexibility Act (RFA) requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever an agency is required by 5 U.S.C. 553 to publish a general notice of proposed rulemaking for any proposed rule. Similarly, section 604 of the RFA requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553 after being required to publish a general notice of proposed rulemaking. Because of the need to move quickly to address the identified risk, prior notice and comment would be contrary to the public interest. As prior notice and comment under 5 U.S.C. 553 are not

required to be provided in this situation, the analyses in 5 U.S.C. sections 603 and 604 are not required.

F. Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$155,000,000 or more, adjusted for inflation, to either State, local or tribal governments, in the aggregate, or to the private sector in any one year, and is the least burdensome alternative that achieves the objective of the rule.

G. Paperwork Reduction Act

There are no new information collection requirements in this final rule.

H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

I. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321-4347), requires Federal agencies to consider the consequences of major Federal

actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. This interim final rule prohibits the carriage of battery-powered portable electronic smoking devices in checked baggage and the charging of such devices on board a passenger-carrying aircraft. Airline passengers will still be permitted to carry their e-cigarettes in their carry-on baggage or on their person. In other words, the interim final rule only impacts how a passenger may carry battery-powered portable electronic smoking devices on aircraft, not whether a passenger can carry such devices. We find that there are no significant environmental impacts associated with this interim final rule.

J. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://www.regulations.gov/search/footer/privacyanduse.jsp>

List of Subjects in 49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, we amend 49 CFR Chapter I as follows:

PART 175—CARRIAGE BY AIRCRAFT

1. The authority citation for part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81 and 1.97.

2. In § 175.10, redesignate paragraphs (a)(19) through (a)(24) as paragraphs (a)(20) through (a)(25) and add new paragraph (a)(19) to read as follows:

§175.10 Exceptions for passengers, crewmembers, and air operators.

(a) * * *

(19) Except as provided in § 173.21 of this subchapter, battery-powered portable electronic smoking devices (e.g., e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, electronic nicotine delivery systems) when carried by passengers or crewmembers for personal use must be carried on one's person or in carry-on baggage only. Spare lithium batteries must be individually protected so as to prevent short circuits (by placement in original retail packaging or by otherwise insulating terminals, e.g., by taping over exposed terminals or placing each battery in a separate plastic bag or protective pouch). Each lithium battery must be of a type which meets the requirements of each test in the UN Manual of Tests and Criteria, Part III, Sub-section 38.3. Recharging of the devices and/or the batteries on board the aircraft is not permitted. Each battery must not exceed the following:

(i) For lithium metal batteries, a lithium content of 2 grams; or

(ii) For lithium ion batteries, a Watt-hour rating of 100 Wh.

* * * * *

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CFR part 1.97

Marie Therese Dominguez

Administrator

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